Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

MERVIN SCOTT WILLMAN
Petitioner,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED

The Court of Appeals below held that under This Court's holding in *Lewis v. Casey,* 518 U.S. 343 116 S.Ct 2174 135 L.Ed.2d 606, (1996) that access between an inmate and his self-chosen counsel could be denied (access was denied because inmate and attorney are brothers) that an inmate could not maintain suit if the inmate did not suffer the missing of a filing deadline. The Issue Presented is:

Whether the decision of the Court of Appeals should be reversed because the violation of Petitioners textually committed 1st and 14th Amendment Right to Access the Courts and Counsel are Rights:

> "so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."[1]

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[1] *Washington v. Glucksberg,* 521 U.S. 702, 117 S.Ct 2258, 138 L. Ed. 2d 772 (1997) citing *Palko v. Connecticut,* 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). *at 2268.*

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The names of all the parties below before the United States Sixth Circuit Court of Appeals are not contained with the case caption.

Petitioner is Mervin Scott Willman pursuant to S.Ct. Rule 29.6, states there is no parent or subsidiary company to be listed.

The Respondents before the Sixth Circuit and This Court are; The Michigan Department of Corrections (M.D.O.C.), Dennis McGinnis Director M.D.O.C., Dennis Straub, Acting Warden Cotton Correctional Facility Ralph Morgan, Assistant to Warden of the Cotton Correctional Facility. Suit was brought against all Respondents in their individual and official capacities, jointly and severally.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mervin Scott Willman seeks a writ of certiorari to review an opinion and order of the United States Court of Appeals for the Sixth Circuit, which affirmed an opinion and order by the United States District Court for the Eastern District, Southern Division of Michigan which dismissed in its entirety all of Petitioner's claims (which included declaratory relief) against all Respondents.

OPINIONS BELOW

The Opinion and Order of the Court of Appeals for the Sixth Circuit dated June 2, 1999, is an unpublished Per Curiam Opinion and is reprinted in the appendix hereto ('App.") at A1.

The Order of the United States District Court for the Eastern District, Southern Division of Michigan dated March 25, 1998, adopting Magistrates Judge's two Reports and Recommendations is reprinted at App. E1 .

The Magistrates First Report and Recommendation dated January 21, 1998 is reprinted at App.B1., the Magistrates Supplemental Report and Recommendation dated February 24, 1998, is reprinted at App. C1.

There were two other additional orders in this matter. First, Order Regarding Stay of the Proceedings is reprinted at App. D1., and second Order Granting Temporary Restraining Order is reprinted at App. F1, both documents are referred infra.

JURISDICTION

Pursuant to 28 U.S.C. § 1254(1) jurisdiction is vested with this Court. The filing of this Petition is within 90 days from the Sixth Circuit's June 2, 1999 Order (S.Ct. Rule 13 (1)) .

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III. section 2., Article VI. section 2., the 1st, 11th and 14th Amendments to the United States Constitution, along with pertinent Federal Statutes are reproduced in Appendix H1-3.

STATEMENT OF THE CASE

Petitioner (Mervin Scott Willman), is a prisoner housed by the Michigan Department of Corrections. Petitioner's brother (Daniel C. Willman) is an attorney. When Petitioner exhausted all of his available State remedies to overturn his conviction he turned to his brother to pursue a Writ of Habeas Corpus. In late July 1997, Petitioner's counsel\brother in his capacity of legal counsel, was denied the same access to Petitioner as would have been granted any other attorney\client under like circumstances.

Counsel was told that due to the existence of the family relationship Counsel could visit Petitioner during limited family visiting hours *only*.

The authority cited to deny access to Petitioner was Michigan Prison Rule 607, Mich. Admin. Code r. 791.6607, which

holds in part (reprinted at App.G1):

> A visit described in sub rule (2) of this rule shall not be counted toward a prisoner's visiting quota.
>
> (2) Except when the person is related by blood or marriage, a prisoner shall be allowed to visit with any of the following persons; who shall not be required to be on the prisoner's approved visitor list. [2]

Petitioner filed a complaint and Motion for a preliminary injunction which was granted (App. F1) by The Honorable Bernard A. Friedman sitting in substitution for The Honorable Gerald E. Rosen [who was sitting on the bench for the Sixth Circuit by designation]), which allowed Petitioner's Counsel to have access to Petitioner until the due date for Petitioner's Habeas Relief Petition.

Following the grant of the preliminary injunction, Respondents filed two motions to dismiss claiming their denial of access to counsel was related to a legitimate penological concern of the M.D.O.C.. The "concern" Respondents raised was that there existed a greater possibility that contraband could be passed if Petitioner and his Counsel were allowed to visit during non-family hours and that the institutional integrity of the prison would be compromised. Petitioner responded that visits during non-family

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[2] From its plain language, Section (2) reads as an exception [and not a limitation for family members] for those not on a prisoner's approved family visiting list and appears to suggest that an attorney on a prisoner's approved family list who is also prisoner's counsel can see the prisoner during non-family visiting hours, but said visit will count against the prisoner's visitation quota.

hours consist of counsel and client in the presence of at least one corrections officer, there are normally only three individuals in the area. Conversely many individuals are present during family visiting hours, creating an atmosphere of distraction where contraband could more easily be passed (Respondents never addressed\disputed the preceding fact, nor did the District Court).

Respondents raised other defenses, stating that Petitioner had failed to plead sufficient facts as to any wrong-doing on the parts of the individually named Respondents, yet Respondents admitted that Petitioner's access to counsel had been interfered with, thus clearly putting said Respondents on notice of the nature of Petitioner's claims.

Respondents also raised the defenses of 11th Amendment sovereign and good-faith ("Harlow") immunity, claiming the District Court lacked subject matter jurisdiction and that the Right to Counsel in the matter at hand was not a clearly established right.

While awaiting the District Court response to Respondents's motions to dismiss, Petitioner suffered several ongoing retaliatory violations of his Constitutional Rights. The first such violation occurred when Petitioner's legal mail was interfered with. The next violation suffered by Petitioner concerned the Americans with Disabilities Act.[3]-[4]

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[3] In Pennsylvania Department of Corrections, et al., v. Yeskey, 524 U.S.206, 118 S.Ct 1952, 141 L.Ed 215, (1998) this Court recognized that The Americans with Disabilities Act of 1990, §§ 201(1), 202, 42 U.S.C. §§ 12131(1), 12132 was applicable to prisons. Prisons fit within the definition of institution

The violations above occurred as Petitioner awaited response from the District Court. When no response was forthcoming, and because of the continuing retaliatory Constitutional violations, Petitioner brought a motion to Stay the Proceedings in order to allow Petitioner to petition the United States Supreme Court. Though the motion above was denied, it did find the District Court's attention (Reprinted at App. D1.), and the District Court (Honorable Magistrate Judge Steven D. Pepe) issued a"Report and Recommendation and Order Regarding Further Briefing to Determine Petitioner's need for Declaratory or Injunctive Relief," App. B1.

The District Court Report and Recommendation held that all Respondents were entitled to 11th Amendment immunity in regard to any claims for monetary damages however the Court recommended that Respondents' motion to dismiss should be denied in regard to Petitioner's claims for declaratory and injunctive relief.

On the issue of whether Petitioner had pled sufficient facts, the District Court held in its Report and Recommendation that

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(See Appendix H, at H2).

Continued from page #4:

[4] Petitioner, an amputee (left leg below-knee) suffers chronic bone infection and imbalance from right leg dysfunction secondary to surgical removal of muscle and tendons. Respondents assigned Petitioner to a work-detail that he could not preform without risk of serious injury, Petitioner refused the work-detail and was moved to a area that could not adequately accommodate his disability.

Petitioner had not. The Court did note that Petitioner had alleged facts (in a Reply Brief to Respondents's motion to dismiss) that showed personal involvement of all Respondents, the Court concluded that even if such facts were included in an amended complaint Respondents would be entitled to qualified immunity.

The Court next addressed Petitioner's claims that his First Amendment Right to access the Courts was violated. The Court noted several cases that held prisons can impinge on an inmate's rights if the regulation in question is reasonably related to a legitimate penological concern. The Court went on to conclude that in order for Petitioner to prevail he would need to make a showing that he suffered some form of actual prejudice, the Court concluded its report by ordering Petitioner to demonstrate that he had suffered actual prejudice.

In Petitioner's response to the District Court's Report and Recommendation and Order to show actual prejudice. Petitioner responded that he was (as alleged supra) subjected to retaliation, via interference with attorney-client mails, and through violations of the Americans with Disabilities Act[5].

Respondents responded to the District Court's Report and Recommendation, by stating that they did not wish to burden the

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[5] Response included exhibits of statements by Petitioner, describing events. Additionally Petitioner responded that he had in fact filed his Petition for Habeas relief in a timely manner but Petitioner contended and still does that an untimely filing is not the sole determinative factor for a showing of actual prejudice.

Court and that they would stand by their prior motions.

Respondents did respond to Petitioner's response to the District Courts' Report and Recommendation. In a series of briefs Respondents always raised the Defense that under the holding of Lewis v. Casey, infra, that Petitioner was not entitled to the assistance of counsel in pursuing Habeas relief, while Petitioner replied several times that Respondents's contention was and is a completely false statement, demonstrating a disregard for the truth so blatant as to warrant sanctions.

After Petitioner and Respondents were done responding, the District Court then issued a Supplemental Report and Recommendation . The Supplemental Report and Recommendation made two findings, first the Court noted Petitioner's claims of retaliatory conduct on the part of Respondents. The District Court held that even if the acts did occur such conduct did not amount to actual prejudice in regard to the then present action (even if this where to be the finding of this Court, Petitioner respectfully asserts that he is entitled to declaratory relief).

The Second finding of the District Court was that Petitioner's claims were conclusory and unsupported. Petitioner strongly disagreed, since the District Court had relied upon pleadings outside of Petitioner's Complaint, Respondents's motion to dismiss had turned into a motion for Summary Disposition and dismissal was improper since material issues were in dispute. Additionally Respondents had never once denied the allegations of interference with the right to counsel, to access the courts, in fact the

only contentions made by Respondents were misleading statements of law, for which Petitioner then and now (see discussion infra) asks for sanctions.

Petitioner responded to the District Court's Supplemental Report and Recommendation, requesting that the Court issue a further Report and Recommendation addressing Petitioner's claims of interference with mail and medical (A.D.A.) concerns, ect.... The District Court Responded by dismissing Petitioner's claims in their entirety.

Petitioner appealed. In an unpublished opinion dated June 2, 1999 the Sixth Circuit Court of Appeals affirmed the District Court dismissal of Petitioner's case. The Court of Appeals asserted that under the holding of *Lewis v. Casey,* 518 U.S. 343 116 S.Ct 2174 135 L.Ed.2d 606, (1996) Petitioner had failed to demonstrate that he had suffered actual prejudice resulting from the visitation restriction in order to make out a violation of his right to access the courts.

Petitioner respectfully asserts that the Court of Appeals application of Lewis, was of such error as to offend this Nation's sense of ordered liberty and directly conflicts with relevant decisions of this Court.

SUMMARY OF ARGUMENT

Counsel for Petitioner was in the final stages of writing a writ of habeas corpus for Petitioner. During this time counsel went to visit Petitioner, counsel was denied access solely for the fact that the two were related. Respondents will only allow visits during family visiting hours, which may vary and which are not always practical for an attorney.

Under the holding of *Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 97 S.Ct 1491, 52 L.Ed 2d 72, (1977), Petitioner is entitled to have meaningful access to the courts. This Right of access can be traced directly to the 1st Amendment which holds in pertinent part: " petition the government for a redress of grievances", this fundamental right is:

> ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg,* 521 U.S. 702, 117 S.Ct 2258, 138 L. Ed. 2d 772 (1997) at 2268, citing *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).

Petitioner also asserts that his right to choose his own counsel is also protected via the 1st Amendment Right to Freedom of Association, *Moore v East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531. (1977). This denial also is an oppressive violation of the Due Process clause of the 14th Amendment, both

substantive (oppressive) and procedural (decision itself is constitutionally defective), *Washington v. Glucksberg,* 521 U.S. 702, 117 S.Ct 2258, 138 L. Ed. 2d 772 (1997), *Howard v. Grinage*, 82 F.3d 1343, 1349, (6th Cir. 1996).

The matter in question implicates the Supremacy clause (Article VI. section 2), Article III. section 2., a M.D.O.C., policy cannot defeat a Fundamental Constitutional Right.

Respondents proffered in the Court below Petitioner did not enjoy such a right, and under the holding of cases such as *Jones v. North Carolina Prisoners'* Union, 433 U.S. 119, 125-26, 97 S.Ct. 2532, 53 L.Ed.2d 629, 81 Lab.Cas. P 13,281 (1976), *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 107 S.Ct 2400, 96 L.Ed. 2d 282 (1987), the policy in question allowed the denial of access because to allow such a visit would compromise institutional security (allegedly counsel could slip contraband to Petitioner) or that it could amount to a showing of favoritism .

Jones supra, dealt with the gathering of many individuals, *Shabazz* supra, dealt with the issue of family contact visits, and neither case is applicable. An attorney visit is closely monitored, the ratio of guards to attorneys and inmates is significantly lower then a visit during family visiting hours and hence the opportunity to pass contraband is significantly lower.

Respondents also contended below that under the holdings of *Lewis v. Casey,* 518 U.S. 343, 116 S.Ct 2174 135 L.Ed.2d 606, (1996) and *Wainwright v. Torna,* 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed. 2d 475 (1982), Petitioner did not enjoy the right to counsel

to pursue habeas relief.

Petitioner asserts that Respondents twisted the holding of *Lewis*. Nowhere within the holding or concurring opinions of *Lewis* is it suggested that inmates do not have the right to have self-appointed counsel to pursue habeas relief, indeed the concurring opinion of Justice Thomas (*Lewis* at 2191) noted such is preferred which is consistent with the majority opinion's analysis in *Lewis* of *Bounds* supra that "alternative" means of access to the courts should be available, a prison library is not the end all of such right, indeed the experiment is encouraged *Lewis* at 2180. As a consequence of such blatant falsity Petitioner asserts sanctions are warranted indeed.

The District Court held Petitioner had not suffered any actual prejudice because he had not missed any filing deadlines or suffered any other form of actual prejudice. Petitioners suffered interferance with his incoming legal mail and asserts that such retaliation does amount to actual prejudice. Petitioner (who is an amputee [lost left leg below the knee, right leg is also severely damaged]) also responded he was retaliated against for the filing of this cause of action and was subsequently transferred to another part of the same facility which could not accommodate his disability.

Respondents also alleged below that Petitioner had failed to plead sufficient facts that Petitioner made nothing more then mere conclusory allegations. Though not required because of the clear legislative mandate of F.R.C.P. 8(a)(2). Petitioner did make a more factual showing in other pleadings including the submission of affidavits. Since the Court considered matters outside of the

pleadings Respondents' motion to dismiss had turned into a motion for summary judgment. Respondents had the burden of production, to come forward with affidavits etc., yet failed, as a result Petitioner asserts the granting of dismissal by the Court below was in error.

Because the violation in question arises under direct M.D.O.C. policy, Respondents are not entitled to 11th Amendment Immunity in their official capacities. Respondents are also not entitled to qualified "Harlow" (infra) immunity because the right in question is clearly established. (the proper focus of meaningful access is denoted by an inmate's right to access the courts, (*Childs v. Pellegrin,* 822 F.2d 1382, 1385 (6th Cir.1987). Additionally since the main thrust of this case has always been the seeking of declaratory relief, the ancillary monetary relief sought by Petitioner is not barred by the 11th Amendment, *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 1357-1358, 39 L.Ed.2d 662 (1974).

Due of the nature of this case it is capable of repetition yet evading judicial review, if Petitioner were to prevail before This Court counsel would be entitled to an award of reasonable attorney fees and cost.

REASONS FOR GRANTING THE WRIT

I.
THE IST AND 14TH AMENDMENT RIGHTS ASSERTED BY PETITIONER ARE "SO ROOTED IN THE TRADITIONS AND CONSCIENCE OF OUR PEOPLE AS TO BE RANKED AS FUNDAMENTAL", AND "IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY," SUCH THAT "NEITHER LIBERTY NOR JUSTICE WOULD EXIST IF THEY WERE SACRIFICED."

Under the holding of *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed 2d 72, (1977), Petitioner is entitled to meaningful access to the courts. This Right of access can be traced directly to the 1st Amendment which holds in pertinent part: " petition the government for a redress of grievances", as This Court has noted :

> ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Glucksberg* supra at 2268, citing *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).

Meaningful access is not denoted by the time an inmate is allowed in his prison library, the proper focus of meaningful access is denoted by an inmate's right to access the courts, *Childs v. Pellegrin*, 822 F.2d 1382, (1987) "the First Amendment right to petition, as currently interpreted, is a birthplace for the right of court access", *Bieregu v. Reno*, 59 F.3d 1445, 1453 (1995). Clearly any inmate would prefer to be represented by counsel then pro se.

Petitioner's right to choose his own counsel is protected via the 1st Amendment Right to Freedom of Association, *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) Respondents proffered in the Court below (that Petitioner did not enjoy such a right, and under the holding of cases such as *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125-26, 97 S.Ct. 2532, 53 L.Ed.2d 629, 81 Lab.Cas. P 13,281 (1976), *O'Lone v. Estate of Shabazz, 482* U.S. 342, 107 S.Ct 2400, 96 L.Ed. 2d 282 (1987), the policy in question allowed the denial of access because to allow such a visit would compromise institutional security (allegedly counsel could slip contraband to Petitioner) or that it could amount to a showing of favoritism thus Respondents contended that the policy in question was related to a legitimate penological concern.

*Jones*supra, dealt with the gathering of many individuals, *Shabazz* supra, dealt with the issue of family contact visits, and neither case is applicable. An attorney visit is closely monitored, the ratio of guards to attorneys and inmates is significantly lower then a visit during family visiting hours and hence the opportunity to pass contraband is significantly lower.

The right of inmates to access the Courts also implicates the Due Process Clause of the 14th Amendment as this Court noted per Justice Thomas concurring opinion in *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct 2174 135 L.Ed.2d 606, (1996):

> In the end, I agree that the Constitution affords prisoners what can be termed a right of access to the courts. That right, rooted in the Due Process

> Clause and the principle articulated in Ex parte Hull, is a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court. At 2195.

This denial suffered by Petitioner was an oppressive violation of the Due Process clause of the 14th Amendment, both substantive (oppressive) and procedural (decision itself is constitutionally defective).

The standard followed by the Sixth Circuit for examining violations that implicate the 14th Amendment was set forth in *Howard v. Grinage*, 82 F.3d 1343, 1349, (6th Cir. 1996). In *Howard* the Court examined both the procedural and substantive prongs of the 14th Amendment. In addressing the procedural requirements of the 14th Amendment the *Howard* Court held:

> . . . the constitutional inquiry no longer addresses what process was due and whether it was constitutionally sufficient, *but whether the decision to deprive was itself constitutionally defective*. See *Loudermill*, 470 U.S. at 541-42, 105 S.Ct. at 1492-93. It would be inconsistent with any articulable rationale underlying due process to focus on the failure to provide process when the deprivation has already occurred without it. At 1350.

The fact that the focus is upon the decision and not the process is in accordance with this Court's holding in *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct 2258, 138 L. Ed. 2d 772 (1997) :

> Due Process Clause "protects individual liberty against 'certain government actions *regardless of the fairness of the procedures used* to implement them' ") (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)). At 2267. [6]

Since the process (inquiry) upon which Respondents arrived at their decision to deny access need not be addressed, the focus shifts to the decision itself, which was itself "Constitutionally defective".

In regard to substantive due process the *Howard* Court held:

> *Substantive due process*, serves the goal of preventing "governmental power from being 'used for purposes of oppression,' " regardless of the fairness of the procedures used. See *Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)* (citation omitted). *Howard* at 1349.

Applying the above holding to the case at hand, it does not

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[6] This Court's holding in *Glucksberg*, also noted :

beginning with *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 1923). . . . that the Fourteenth Amendment protected "the right of the individual to contract . . . . At 2280.

This holding is in line with Petitioner's position that his right to access his self-chosen counsel also falls within the purview of the 14th Amendment as well as the 1st Amendment.

matter if Respondents believed that the M.D.O.C. policy and procedures used to deny access to counsel was fair. What does matter is that the denial was purely used for the purposes of oppressing Petitioner's right to meaningful access of the courts.

As cited supra Respondents retaliated against Petitioner for exercise of his First Amendment Rights[7] thus their actions amounted to an oppressive violation of the 14th Amendment as well.

II.
THE REGULATION IN QUESTION IS IN DIRECT VIOLATION OF THE SUPREMACY CLAUSE.

This cause of action revolves around the enforcement of an M.D.O.C. policy and an inmate's right to access the courts and his self-chosen-counsel. The MDOC decision in question is based on "a policy", the rights that have been herein asserted have roots that run deep and have been a part of this Nation's landscape since its founding, such implicit Fundamental rights were recently revisited by this Court in *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct 2258, 138 L. Ed. 2d 772 (1997), where This Court held:

> the Due Process Clause specially protects those

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7 "The law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional...."..... [U]nder binding Sixth Circuit precedent, the law regarding retaliation was clearly established... and defendant is not entitled to qualified immunity. *Riley v. Kurtz*, 893 F. Supp., 709 (1995) at 723 citing *Zilich v. Longo*, 34 F.3d 359 at 365 (6th Cir.1994).

> fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," id., at 503, 97 S.Ct., at 1938 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). *Gluskburg* at 2267-68.

Respondents additionally contended in the Court below that the Court lacked proper subject matter jurisdiction. Since the rights asserted by Petitioner are based on Constitutional grounds Petitioner asserts that the Court below did have proper subject matter jurisdiction (Article III. section 2).

The question that must be asked is whether the right to access the courts (the 1st and 14th Amendments) must take a back seat to M.D.O.C. policy, Petitioner asserts (based on the argument above and which follows) in no uncertain terms that if the Supremacy Clause (Article VI. section 2) is to be accorded its due then clearly the answer is NO.

Due to the repugnance of the policy in question and the implications of the Supremacy clause *(Marbury v. Madison* ,5 U.S. (1Cranch) 137, 2 L.Ed. 60 (1803)) dismissal was improper.

III.
RESPONDENTS' APPLICATION OF LEWIS V. CASEY WAS INTENTIONALLY MISLEADING, SANCTIONS WERE WARRANTED.

Respondents contended below that *Lewis v. Casey,* 518 U.S. 343, 116 S.Ct 2174 135 L.Ed.2d 606, (1996) stood for the premise that inmates do not have the right to counsel for *habeas* or civil rights actions. Thought it has been held inmates are not entitled to state paid assistance of counsel nowhere in the holding of Lewis, is it suggested that a prisoner is not entitled to the assistance\access of self-chosen counsel in a Habeas action. In his concurring opinion Justice Thomas noted such:

> Like anyone else seeking to bring suit without the assistance of the State, prisoners can seek the advice of an attorney, whether pro bono or paid, and can turn to family, friends, other inmates, or public interest groups. Inmates can also take advantage of the liberal pleading rules for pro se litigants and the liberal rules governing appointment of counsel. Federal fee-shifting statutes and the promise of a contingency fee should also provide sufficient incentive for counsel to take meritorious cases. Justice Thomas, concurring, *Lewis* at 2191. [8]

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[8] Justice Thomas's Concurring Opinion is consistent with the hold of *Bounds*, wherein the majority opinion per Justice Scalia noted in *Lewis:*

> Although it affirmed a court order requiring North Carolina to make law library facilities available to inmates, it stressed that that was merely "one constitutionally acceptable method to assure meaningful access to the courts," and that *"our*

Respondents twisted the holding of *Lewis*, beyond matters this Court did not address. In light of Respondents misrepresentations Petitioner request this Court award F.R.C.P. 11, sanctions.

IV.

UNDER THE FACTS AND CIRCUMSTANCES RESPONDENTS ARE NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY IN THEIR OFFICIAL CAPACITIES.

Though it cannot be denied that the power of the Federal Courts in some matters is shown to be coextensive with that of the States, neither can it be denied that Respondents by virtue of the position they hold over Petitioner, committed the acts complained of (it was the official policy of the M.D.O.C. that caused the violation in question. *Kentucky v Graham ect al.*, 473 U.S. 159, 167, 105 S.Ct 3099, 87 L.Ed. 2d 114, (1985) and though Respondents had nothing to do with the fact that Petitioner is incarcerated and within the custody of the M.D.O.C., it is that custody upon which Petitioners' claims rest. As such Respondents

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decision here ... does not foreclose alternative means to

Continued from page 19.

achieve that goal." Bounds, 430 U.S., at 830, 97 S.Ct., at 1499. In other words, prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Id., at 825, 97 S.Ct., at 1496. *Lewis at 2180 (citing Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).*

cannot seek to clothe themselves with 11th Amendment Immunity *(Home Telephone & Telegraph Company, v. City of Los Angeles et al.* 227 U.S. 278, 33 S.Ct 312, 57 L.Ed 510; (1913) [in their official capacities]), when the acts they have committed are of such repugnancy as to be of Constitutional Magnitude. Petitioners' 14th Amendment rights have been violated. Because of Respondents' retaliatory conduct against Petitioner, Respondents are not entitled to immunity *Zilich v. Longo,* 34 F.3d 359 at 365 (6th Cir.1994).[9] *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct 2727, 73 L.Ed.2d 396 (1981) .

V.

DECLARATORY RELIEF IS WARRANTED AND THE MONETARY RELIEF SOUGHT IS "ANCILLARY" TO INJUNCTIVE RELIEF AND IS NOT BARRED BY THE ELEVENTH AMENDMENT.

The main thrust of this cause of action has always been declaratory relief. In his Complaint Petitioner also sought monetary relief. Under the holding of *Kentucky v Graham ect al.*, 473 U.S. 159, 105 S.Ct 3099, 87 L.Ed. 2d 114, (1985) the Court held:

> ... Monetary relief that is "ancillary" to injunctive relief also is not barred by the Eleventh Amendment. At 169.

Petitioner asserts that because the main thrust of this cause of action was declaratory that monetary relief is not barred.

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9 Id., at pg 17, footnote #7, *Zilich v. Longo,* 34 F.3d 359 at 365 (6th Cir.1994).

VI.
THIS CASE IS CAPABLE OF REPETITION YET EVADING JUDICIAL REVIEW.

In the case at hand Petitioner has a specific need to access of counsel and that need is a justiciable question, and said question is within this Court's powers to hear. *United States v. Nixon, et al.*, 418 U.S. 683, 94 S.Ct. 3090, 41 L. Ed. 2d 1039,(1974),*(Also see Globe Newspaper Company v. Superior Court For the County Of Norfolk, 457* U.S. 596,102 S.Ct 2613, 73 L.Ed.2d 248,(1982)).

VII.
PETITIONER IS ENTITLED TO A RECOVERY OF REASONABLE ATTORNEY FEES AND COST.

If this Court were to strike down the M.D.O.C. policy in question Petitioner would hence prevail on a significant issue and counsel would be entitled to a reasonable award of attorney fees. *Hensley v. Eckerhart, 461 U.S.* 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). (also see 42 U.S.C § 12205, Attorney fees under Americans with Disabilities Act, App. H, pg H3).

VIII.
PETITIONER PLED SUFFICIENT FACTS AND DID DEMONSTRATE ACTUAL PREJUDICE.

Petitioners' complaint meet the clear legislative mandated pleading standard of F.R.C.P. 8(a)(2) In *Atchinson v. District of Columbia,* 73 F.3d 418, 315 U.S.App.D.C. 318, 33 Fed R.Serv. 3d 1033 (1996) at 412-422 citing *Leatherman v. Tarrant County* Narcotics Intelligence and Coordination unit et al., 507 U.S. 163,

113 S.Ct 1160, 112 L.Ed. 2d. 517(1993)

In a motion to dismiss the burden of persuasion is upon the moving party, all allegations are taken as true and all inferences favorable to plaintiff will be drawn, additionally if the court considers matters outside the pleadings before it in a F.R.C.P. 12(b)(6) motion, the above procedure will automatically be converted into a F.R.C.P., Rule 56 summary judgment procedure, *Rmititanium v. Westinghouse,* 78 F.3d 1125, 34 Fed. R. Serv. 3d 1288, (6th Cir. 1996).

Respondents made assertions that Petitioner's complaint made nothing more then mere unsupported conclusory allegations yet Respondents did not deny that a denial of Petitioner's access to counsel had occurred, thus the main material fact in question was not in dispute.

Respondents failed to bring forth affidavits or any other supporting materials to bolster their position. Conversely the burden of proof was improperly shifted upon Petitioner, who did come forth with supporting materials (affidavits) as cited supra, Petitioner raised several instances of retaliatory conduct on the part of Respondents that Petitioner believed demonstrated actual prejudice (interferance with legal mail etc.).

Additionally The District Court in its Supplemental Report and Recommendation held that under the holding of *Twyman v. Crisp,* 584 F.2d 352, 357 (10th Cir. 1978), actual prejudice can only be demonstrated by a showing that an inmate has missed an actual filing deadline ect. Petitioner rejects such an assertion.

CONCLUSION

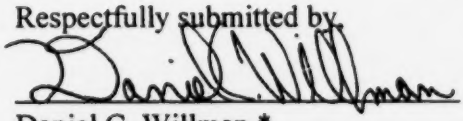
Petitioner's right to access counsel is "implicit with this Nation's sense of Ordered Liberty". It is a right textually committed to the United States Constitution via the First Amendment Right to Petition and is consistent with this Courts First Amendment jurisprudence.

Additionally the Right asserted by Petitioner is consistent Historically with this Court's Fourteenth Amendment holdings protecting Fundamental Rights.

Even if the individually named Respondents' (Straub, Morgan, McGinnis are dismissed) Petitioner requests that this Court strike down the M.D.O.C. policy in question due to its' repugnance to the United States Constitution, and grant Petitioner permanent declaratory relief, an award of reasonable attorney fees in addition to costs and sanctions for Respondents's misrepresentation of *Lewis v. Casey* supra.

For all of the forgoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted by,



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Nº. 98-1454

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MERVIN SCOTT WILLMAN *Plaintiff-Appellants* v. MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL., *Defendants-Appellees.*	) On Appeal From The United States District Court For The Eastern District of Michigan

6th Circuit
Court of Appeals
Filed 6/2/99
Leonard Green,
Clerk

BEFORE: GUY, SUHRHEEIGUCH, and GILMAN, Circuit Judges.

PER CURIAM. Plaintiff Mervin Scott Willman, a prisoner, brought this 42 U.S.C. § 1983 suit claiming that his constitutional rights were violated when prison officials allowed his brother, who was serving as his attorney in a habeas corpus action, to visit only during family visitation hours. Willman appeals the dismissal of his suit pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). We **AFFIRM**.

I. BACKGROUND

Willman is a prisoner in the custody of the Michigan Department of Corrections ("MDOC") and is housed at the

Robert Cotton Correctional Facility ("RCCF") located in Jackson, Michigan. Willman retained the services of his brother to file a habeas corpus petition. During the course of the representation, prison officials, acting pursuant to Michigan Prison Rule 607,[1] permitted Willman's brother to visit only during family visitation hours. According to Willman, attorneys are given greater access to prisoners than are family members.

On August 4, 1997, Willman filed a complaint seeking damages, attorney's fees, and a declaration that the visitation policy violated his constitutional rights. Willman named the

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[1] Michigan Prison Rule 607 provides in relevant part:

(1) The department shall establish reasonable visiting hours and uniform quotas at each institution for visits to prisoners to promote order and security in the institutions and to prevent interference with institutional routine or disruption of the prisoner's programming. A visit described in subrule (2) of this rule shall not be counted toward a prisoner's visiting quota.

(2) Except when the person is related to the prisoner by blood or marriage, a prisoner shall be allowed to visit with any of the following persons, who shall not be required to be on the prisoner's approved visitor list:

. . .

(c) Attorneys on official business or a legal paraprofessional or law clerk who is acting as an aide to counsel for the prisoner.

Mich. Admin. Code r. 791.6607 (1995).

MDOC as a defendant. Willman also named as defendants, both in their official and individual capacities, Kenneth McGinnis, Director of the MDOC; Dennis Straub, Acting Warden of the RCCF; and Ralph Morgan, Assistant to the Warden of the RCCF.

That same day, Willman filed a motion for a temporary restraining order and preliminary injunction. On August 7, 1997, the temporary restraining order was granted, which prohibited Defendants from restricting visitation to family visitation hours. The temporary restraining order expired on October 28, 1997, the deadline for filing Willman's habeas corpus petition. Defendants filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The district court referred the case to a magistrate judge, who recommended that Defendants' motions be granted.

The magistrate judge construed the various constitutional claims in Willman's complaint as essentially alleging a violation of his right of access to the courts. In his initial report dated January 21, 1998, he recommended that the claim against Defendant MDOC and the claim of damages against the individual defendants in their official capacities be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) on Eleventh Amendment grounds. The magistrate judge also recommended dismissal of the claim against the individual defendants in their individual capacities pursuant to Fed. R. Civ. P. 12(b)(6) because Willman did not allege that they were personally involved in the decision to impose the visitation restriction.[2]

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[2] The magistrate judge noted that Willman had alleged personal involvement by each of the individual defendants in his response to Defendants' motions to dismiss. Nevertheless, he

Regarding the claims of declaratory and injunctive[3] relief against the individual defendants in their official capacities, the magistrate judge concluded that Willman was required to allege actual prejudice resulting from the visitation restriction in order to make out a violation of his right of access to the courts. In an exercise of caution, the magistrate judge gave Willman until February 10, 1998, to file a supplemental response demonstrating any prejudice. Willman's response claimed that he suffered prejudice as a result of financial costs associated with obtaining the temporary restraining order and filing the present action. Willman also claimed that he was prejudiced because Defendants transferred him to a different cell in retaliation for bringing the present suit, denied him proper medical treatment, and interfered with his legal mail.

In his second report dated February 24, 1998, the magistrate judge recommended that the claim for declaratory and injunctive relief be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because Willman's allegations of prejudice did not show that he had suffered any actual injury resulting from the visitation restriction. The district court adopted the recommendations in both reports.

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concluded that even if those allegations were considered as part of the complaint, or if the complaint was amended to include them, Willman could not recover damages against the individual defendants because they are entitled to qualified immunity.

[3] The magistrate judge interpreted Willman's application for a temporary restraining order as a request for injunctive relief.

Willman appeals the dismissal of his complaint.

II. DISCUSSION

Prison officials violate an inmate's right of access to the courts when they prevent "a reasonable opportunity to seek and receive the assistance of attorneys." See Procunier v. Martinez, 416 U.S. 3 96, 419 (1974), *overruled on other grounds by Aornburgh v. Abbott*, 490 U.S. 401 (1989); *see generally Bounds v. Smith*, 430 U.S. 817 (1977) (recognizing a prisoner's constitutional right of access to the courts). In *Lewis v. Casey*, 518 U. S. 343 (1996), the Supreme Court explained that a prisoner asserting a violation of his right of access to the courts must demonstrate actual injury, *i.e.*, that he was hindered in his efforts to pursue a legal claim. *See id.* at 3 5 1. Unlike previous cases from this circuit requiring actual injury as merely an element of the constitutional tort, *see, e.g., Walker v. Mintzes*, 771 F.2d 920 (6th Cir. 1985), Lewis made clear that the requirement is derived from the doctrine of standing. *See Lewis*, 518 U.S. at 349; *see also Hadix v. Johnson*, --- F.3d ---, 1999 WL 176155, at *5 (6th Cir. April 1, 1999) (noting that *Lewis* requires a showing of actual injury to establish standing).

Willman has failed to demonstrate any actual injury resulting from the visitation restriction. Willman's complaint does not allege that he was impeded in his efforts to obtain a writ of habeas corpus. In fact, the temporary restraining order prohibited Defendants from restricting visitation to family visitation hours prior to the filing deadline of Willman's habeas corpus petition. Furthermore, Willman's asserted claims of prejudice in response to the magistrate judge's order of January 21, 1998, do not demonstrate that he suffered any actual injury caused by the

visitation restriction imposed by Defendants. Therefore, under *Lewis*, Willman lacks standing.

Willman's remaining claims, are without merit and we need not address them any further.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's dismissal of Willman's complaint.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,
PLAINTIFF,

CASE NO. 97-CV-73866-DT

VS.

MICHIGAN DEPARTMENT OF CORRECTIONS, KENNETH MCGINNIS, DENNIS STRAUB, RALPH MORGAN, SUED IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES,
DEFENDANTS.

HONORABLE GERALD E. ROSEN
HONORABLE STEVEN D. PEPE

Report and Recommendation and Order Regarding Further Briefing to Determine Plaintiff's Need For Declaratory or Injunctive Relief

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I. BACKGROUND

Plaintiff Melvin Scott Willman is a prisoner in the custody of the Michigan Department of Corrections (MDOC) and is housed at the Robert Cotton Correctional Facility located in Jackson, Michigan. Plaintiff, represented by counsel, filed his complaint on August 4, 1997. On the same date, plaintiff also filed a motion for temporary restraining order and preliminary injunc-tion. On August 7, 1997, Judge Friedman, in Judge Rosen's absence, granted the temporary restraining order, ordering the individual defendants to permit plaintiff's attorney

to visit plaintiff during non-family visitation hours. The temporary restraining order was to expire on October 28, 1997. Defendant Kenneth McGinnis is the Director of the MDOC, defendant Dennis Straub is the Acting & Warden, and defendant Ralph Morgan is the Warden's Assistant.

In his complaint, plaintiff alleges that defendants have violated his constitutional rights by restricting his attorney-brother's visits to family visitation hours only. Plaintiffs brother, an attorney, is representing him in a habeas corpus action which was to be filed by October 28, 1997.[1] Plaintiff claims that he was denied visitation with his attorney during non-family visitation hours because his attorney is a family member. The restriction was imposed pursuant to Michigan Prison Rule 607, Mich. Admin. Code r. 791.6607, which prohibits visitation with a prisoner by his attorney during non-family visitation hours if the attorney is related to the prisoner.[2] Plaintiff states that "it is not practical for Plaintiff's counsel to see Plaintiff only during family visiting hours." (Plaintiff's Complaint, p. 3). Plaintiff further contends in order for his attorney to handle his habeas

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[1] Daniel C. Willman, Plaintiff's brother, is also representing plaintiff in the present action.

[2] Rule 607 provides in part that:

> (2) Except when the person is related to the prisoner by blood or marriage, a prisoner shall be allowed to visit with any of the following persons, who shall not be required to be on the prisoner's approved visitor list:
>
> * * *
>
> (c) Attorneys on official business or a legal paraprofessional or law clerk who is acting as an aide to counsel for the prisoner.

(Michigan Prison Rule 607, Mich. Admin. Code r. 791.6607)

action effectively, he needs visitation with his attorney. Because defendants denied visitation between plaintiff and his attorney, plaintiff claims defendants violated his First Amendment of access to the courts to petition for redress of his grievance.[3] Plaintiff seeks a declaration that the MDOC visitation policy is unconstitutional, injunctive relief,[4] damages and attorney's fees.

Defendant McGinnis filed a motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on August 21, 1997. Defendants Straub and Morgan also filed a

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[3] Plaintiff asserts defendants violated his equal protection and due process rights. In addition, plaintiff claims his First Amendment right of freedom of association has been violated. In Gins v. Mauser Plumbing Supply Co., 148 F.2d 974, 976 (2d Cir. 1945), Judge Charles Clark noted:

> A simple statement in sequence of the events which have transpired, coupled with a direct claim by way of demand for judgment of what the plaintiff expects and hopes to recover, is a measure of clarity and safety; and even the demand for judgment loses its restrictive nature when the parties are at issue, for particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled whether demanded or not.

148 F.2d at 976 (citing, Stephen, *Pleading*, 458-465, (Williston's Ed. 1895); Shipman, *Common- Law Pleading*, 203-206 (3d Ed. Ballantine 1923)). Therefore, the court addresses plaintiff's allegations as a First Amendment right of access to the courts to petition for redress of grievances.

[4] Plaintiff filed a motion for preliminary injunction on the same day he his complaint This motion should be read as a supplement to the complaint adding a claim for injunctive relief against defendants in their official capacities.

motion to dismiss plaintiffs complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on September 11, 1997.[5] Defendants assert plaintiffs complaint should be dismissed because plaintiff has failed to allege facts demonstrating that defendants were personally involved in the alleged constitutional violation and they are entitled sovereign immunity and qualified immunity.

II. STANDARD OF REVIEW

A. Sovereign immunity

1. Eleventh amendment immunity; Fed. R. Civ. P. 12(b)(1)

Defendants argue that plaintiff's complaint should be dismissed because they are entitled to immunity under the Eleventh Amendment. When subject matter jurisdiction is challenged, the party invoking federal jurisdiction bears the burden of proof on the issue. If the challenge to the court's subject matter jurisdiction is facial rather than factual, plaintiff's allegations must be taken as true, and all inferences are to be drawn in his favor. If the challenge is factual, the court must weigh the evidence concerning jurisdiction and is empowered to resolve any factual disputes. *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996); *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). A dismissal under Rule 12(b)(1) is without preclusive effect except as to the jurisdictional issues. *Id.* In this case, there appears to be no dispute concerning the jurisdictional facts, and plaintiffs factual allegations are presumed, for purposes

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[5] Defendant McGinnis and defendants Straub and Morgan make essentially the same arguments in their separate motions. Therefore, I will treat the motions together in this Report and Recommendation.

of this jurisdictional analysis, to be true.

A state official being sued in his or her official capacity is immune from liability for civil damages, and in order to pursue such claims "plaintiffs seeking damages under § 1983 [must] set forth clearly in their pleadings that they are suing the state defendants in their individual capacity for damages, not simply in their official capacity." *Wells v. Brown*, 891 F.2d 591, 592 (6th Cir. 1989). Plaintiff has sued defendants in their official and individual capacities. Plaintiff's claims against the state and its Department of Corrections and plaintiffs damages claims, against the defendants in their official capacities are barred by the Eleventh Amendment. Because the Court lacks subject matter jurisdiction over the damages claim, plaintiff's claim for damages against defendants in their official capacities should be dismissed.

Plaintiff, however, has also asserted claims for declaratory and injunctive relief for alleged violations of his First Amendment rights. State officials can be sued in their official capacities for injunctive relief. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n. 10, 109 S. Ct. 2304, 105 L.E.2d 45 (1989). In *Will*, the Supreme Court stated "a state official in his or her official capacity, when sued for injunctive relief, would be a person under 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id.* (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14). Therefore, defendants' motion to dismiss plaintiff's claim against defendants in their official capacities for declaratory and injunctive relief should be denied.

B. Dismissal Pursuant to Fed, R. Civ, P. 12(b)(6)

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept all well-pleaded allegations as true and construe them in the light most favorable to plaintiff. *Zinennon v. Burch*, 494 U.S. 113, 117 (1990); 5A CHARLES A.

WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 304 (2d ed. 1990). *See also Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); **Westlake v. Lucas**, 537 F.2d 857 (6th Cir. 1976). A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). It is also well established, however, that conclusory, unsupported allegations of constitutional deprivation do not state a claim. [6]

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[6] *See, e.g., Ana Leon T. v. Federal Reserve Bank*, 823 F.2d 928, 930 (6th Cir.) ("[T]he allegations must be more than mere conclusions, or they will not be sufficient to state a civil rights claim."), *cert. denied*, 484 U.S. 945 (1987); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986) ("It is not enough for a complaint ... to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis for such claims must be set forth in the pleadings."); *Smith v. Rose*, 760 F.2d 102, 106 (6th Cir. 1985) (conclusory, unsupported allegations insufficient to state a claim); *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983) (dismissal of complaint appropriate if allegations of constitutional deprivation are "mere conclusions"); *Ross v. Meagan*, 638 F.2d 646, 650 (3rd Cir. 1981) ("[T]his court has consistently demanded that a civil rights complaint contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs."); *Place v. Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971) ("A pleading will not be sufficient to state a cause of action under the Civil Rights Act if its allegations are but conclusions."); *Borenstein v. City of Philadelphia*, 595 F. Supp. 853, 856 (E.D. Pa. 1984) ("[C]ivil rights complaints must be pleaded with specificity and may not merely make conclusory allegations of constitutional deprivations or the existence of municipal policies."); *Egan v.*

1. Plaintiff fails to state a claim because he does not allege personal involvement by defendants in the alleged constitutional violation.

An essential element of § 1983 claim is personal involvement by the defendants. To impose individual liability on a defendant, a plaintiff must allege facts clearly demonstrating personal involvement by the defendant for the constitutional violation. *See Rizzo v. Goode* 423 U.S. 362 (1976)(injunctive relief); *Bellamy v. Bradley* 729 F.2d 416, 421 (6th Cir.), *cert. denied* 469 U.S. 845 (1984). Section 1983 liability cannot be imposed on supervisory personnel simply on the basis of the right to control employees. *Bellamy*, 729 F.2d 421 (citation omitted). Rather, liability may be imposed for failing to supervise or control subordinates only when a prison official, although not directly involved in the allegedly unconstitutional conduct, either encouraged the specific misconduct or implicitly authorized approved or knowingly acquiesced in the unconstitutional conduct. *Hicks v. Frey*, 992 F.2d 1450, 1455 (6th Cir. 1993)(citation omitted).

Defendants argue that they cannot be held liable because plaintiff has failed to allege facts demonstrating that they were personally involved in the alleged conduct. In his complaint, plaintiff fails to plead specific instances where any of the defendants personally denied him visitation with his attorney. Nor has plaintiff alleged that any defendant encouraged, implicitly authorized, approved or knowingly acquiesced in the alleged conduct. The Court looks to the allegations made in

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Concini 585 F. Supp. 801,803 (M.D. Pa. 1984) (Factual specificity required in order to enable court to evaluate substance of claim).

plaintiff's complaint under a Fed. R. Civ. P. 12(b)(b) motion. Because plaintiff has failed to allege facts stating a claim under Fed. R. Civ. P. 12(b)(6) against defendants McGinnis, Straub, and Morgan, defendants' motion to dismiss should be granted, and plaintiff's damages claims against defendants in their individual capacities should be dismissed. In his briefs responding to defendants' motions, plaintiff's counsel has added facts asserting personal involvement of each defendant in denying plaintiff access to his attorney (Plaintiff's Reply Brief in Response to Defendant McGinnis' Rule 12 Motion, pp. 1-2; Plaintiff's Brief in Response to Defendants' Straub and Morgan Rule 12 Motion to Dismiss, p. 3). Yet, even if these facts were considered to be part of the complaint, or plaintiff's complaint was amended to include them, plaintiff could not recover on his damages claims because, as defendants have argued, they are entitled to qualified immunity.

2. Qualified Immunity

a. Elements of the qualified immunity defense

Government officials who perform discretionary functions are generally entitled to qualified immunity from individual liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Christophel v. Kukulinsky*, 61 F.3d 479, 484 (6th Cir. 1995); *Thomas v. Whalen*, 51 F.3d 1285, 1289 (6th Cir.), *cert. denied*, 116 S. Ct. 518 (1995); *Pray v. Sandusky*, 49 F.3d 1154, 1157-58 (6th Cir 1995). The question whether an official is protected by qualified immunity does not turn on the subjective good faith of the defendants, but rather turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that

were clearly established at the time it was taken. *Harlow*, 457 U.S. at 818-19; *Mackey v. Dyke*, 29 F.3d 1086, 1094 (6th Cir. 1994).

A plaintiff bears the initial burden, in overcoming a qualified immunity defense, of alleging a constitutional violation. *Siegert v. Gilley*, 500 U.S. 226, 231-34, 111 S. Ct. 1789 1793-94 (1991) (defendants are protected by qualified immunity unless plaintiff has alleged facts showing the violation of a clearly established constitutional right; if no alleged right of constitutional magnitude has been violated, the court does not reach the second question of whether it was clearly established). As discussed in more detail below, plaintiff has alleged that defendants have violated his First Amendment right of access to the courts. Plaintiff must allege facts in support of his claim that show a constitutional violation. If he meets this initial burden, it must then be determined -- for purposes of Harlow analysis -- whether defendants knew or should have known that their actions would violate plaintiff s clearly established rights under the First Amendment.

b. Plaintiff's allegation of the violation of his, First Amendment right

i. Standard for determining constitutionality of a restriction on prisoner rights

In *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987), the Supreme Court held that when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. Several factors are relevant in determining the reasonableness of the regulation at issue. First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental objective offered to justify it; the governmental

objective must be a legitimate and neutral one.[7] Second, the court should determine whether there are alternative means of exercising the right that remain open to prison inmates. Third, the court should evaluate the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation; conversely, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns. *Turner*, 482 U.S. at 89-91, 107 S. Ct. at 2261-62.

In reviewing prison regulations, the Supreme Court has repeatedly urged judicial deference to decisions of prison administrators. *See Thornburgh v. Abbott*, 490 U.S. 401, 410 (1989) ("[a]cknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world"); *Turner*, 482 U.S. at 90, 92 (where the right in question "can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike," the courts should defer to the "informed discretion of corrections officials"); *Martinez*, 416 U.S. at 414 ("[s]ome latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the

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[7] *Procunier v. Martinez*, 22 416 U.S. 396, 412 (1974), identified as legitimate government interests "the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners."

proper discharge of an administrator's duty").

ii. Application to the prison regulation at issue

Prisoners have a First Amendment right of access to the courts *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491 (1977) The First Amendment right of access to the courts includes the right to reasonable access to their counsel.

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violation so of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.

Procunier v. Martinez, 416 U.S. 396, 419, 94 S. Ct. 1800 (1974) (citation omitted).

Michigan Prison Rule 607 restricts attorney visitation with a prisoner to family visitation hours when that attorney is related to the prisoner by blood or marriage. Plaintiff has alleged that defendants, in compliance with this regulation, denied him visitation with his attorney, which has obstructed the ability of his attorney to pursue his *habeas* petition. Defendants have proffered prison security justifications for the special limitation placed on family attorneys seeing inmates. Defendants argue "[s]ecurity is a concern since an attorney with a mere business relationship to a prisoner, rather than a familial relationship, is much less Rely to accede to a prisoner's requests to smuggle contraband." (Defendants Straub and Morgan Brief in Support of their Rule 12 Motion to Dismiss, p. 6)

In addition to the alleged justification proffered by defendants, the court must complete the four step analysis under Turner and Rornburgh. Included in this analysis is the inquiry into the extent to which plaintiffs First Amendment rights are abridged by this restriction and its impact on his effectively petitioning the federal court in a habeas case for a redress of grievances. While Procunier prohibits the unjustified obstruction to the assistance of counsel, a critical question is whether the challenged regulation interferes with such representation in the present case.[8] When an attorney is representing a client in preparation for trial, face to face interviews are essential to developing the relationship needed to obtain complete and reliable facts, and to adequately prepare a witness for trial, particularly where the attorney must make a pretrial assessment of the client's demeanor. In a *habeas* case, however, where the record is fixed by the trial proceedings (and in federal cases by what issues were exhausted and presented to the state appellate courts), there is far less of a clear necessity for frequent, if any, face to face in person interviews with the client. The temporary restraining order was entered on August 7, 1997, which ordered defendants to permit plaintiffs attorney visitation in order to file his habeas petition by October 27, 1997. While plaintiff has alleged generally that the restrictive regulation impedes his

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[8] The Sixth Circuit, citing *Twyman v. Crisp*, 584 F.2d 352, 357 (10th Cir. 1978), has suggested that a claim of denial of access to the court must be supported by evidence of actual prejudice, such as missing court deadlines for submission of motions or responsive pleadings. *Walker v. Mintzes*, 771 F.2d 920, 932 (6th Cir. 1985). The inmate must have suffered an actual interference with his case. *Weaver v. Toombs*, 756 F.Supp. 335, 340 (W.D. Mich. 1989).

attorney's effective handling of his *habeas* claims, plaintiff does not allege that he suffered any actual prejudice as a result of being denied multiple visits with his attorney. Nor is it apparent what the future impact of the regulation would have on effective representation after a habeas petition has been filed. Before this Court can fairly determine if the regulation as applied in this case is unconstitutional, additional facts would be needed.

iii Any First Amendment right to visitation with family attorney was not clearly established at the time of defendants' challenged action

The Sixth Circuit has held that if a defendant raises a qualified immunity defense, the plaintiff bears the burden of showing that the constitutional right alleged to have been violated was clearly established at the time of the alleged violation. *Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171, 1174 (6th Cir. 1988); *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). "[I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals, or itself." *Seiter*, 858 F.2d at 1177. Even if we assume that plaintiff has a First Amendment right to less restricted access to his attorney, plaintiff has failed to point to any case stating that a restriction as the one at issue violates an inmate's First Amendment right of access to the courts. In fact, plaintiffs counsel acknowledges in the complaint "[t]his appears to be a case first impression." (Plaintiff's Complaint, p.1). Thus, even if the regulation is found to be unconstitutional, and even if this Court assumed personal involvement of each defendant, plaintiff's damages claims need be dismissed under *Harlow's* qualified immunity.

3. Plaintiff's claims for declaratory and injunctive relief

Defendants challenge plaintiff's pleadings for insufficient allegations of actual prejudice suffered by plaintiff in the pending *habeas* litigation under Fed. R. Civ. P. 12(b)(6). (Defendants Straub and Morgan Rule 12 Motion to Dismiss, p. 8). For the reasons stated in Section H. B. 2. a. ii. above, it is not apparent that plaintiff suffered any actual prejudice. A plaintiff must support his claim of denial of access to courts with evidence of actual prejudice. *Twyman*, 584 F.2d at 357. However, given the important nature of claims being asserted and the fact that defendants responded only to the pleading aspect of the case, plaintiff's counsel should be put on notice that defendants' motion will be treated as a challenge to plaintiff's rights to declaratory relief and any further injunctive relief. Ordinarily these important considerations are determined after a period of discovery and a more fully developed factual record. Plaintiff has had ample time for discovery and should be given an opportunity to respond specifically to the challenge to his claim for declaratory and injunctive relief.

Plaintiff is hereby given until February 10, 1998 to file a supplemental response, demonstrating any actual prejudice, supported by suitable affidavits, declarations, or supplemental evidence to enable the court to consider the need for any further injunctive relief or a declaratory judgment. Defendants will be given ten (10) days to file a reply brief and any affidavits, declarations, or other supplemental evidence Defendants' reply brief is not required, but rather it is optional on the part of defendants. Then, the undersigned will prepare a Report and Recommendation determining whether plaintiff is entitled to any further relief.

III. Recommendation

For the reasons stated above, it is recommended that

defendants' motion to dismiss be granted as to plaintiff's damages claims against defendants. It is further recommended that the Department of Corrections be dismissed as a defendant.

Any objections to this Report and Recommendation must be filed within ten (10) days of its service. 28 U.S.C. §363(b)(1); E.D. Mich. LR 72.1(d)(2). Failure to file objections within the specified time constitutes waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140(1985); *Ivey v. Wilson*, 832 F.2d 950, 957-58 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

Regarding plaintiff's claim for any declaratory or further injunctive relief against defendants in their official capacities, **It is Ordered** that plaintiff file a supplemental response demonstrating any actual prejudice by February 10, 1998. Defendant may file a reply brief within ten (10) days.

s/s Steven D. Pepe
Steven D. Pepe
United States Magistrate Judge

Dated: Jan 21 1998
Ann Arbor, Michigan

Pursuant to Rule 77(d), FRCivP copies have been mailed to the following:
Linda Olvieri

Daniel Willman
on 1/21/99
/s/_____
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,
PLAINTIFF,

CASE NO. 97-CV-73866-DT

VS.

MICHIGAN DEPARTMENT OF CORRECTIONS, KENNETH MCGINNIS, DENNIS STRAUB, RALPH MORGAN, SUED IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES,
DEFENDANTS.

HONORABLE GERALD E. ROSEN
HONORABLE STEVEN D. PEPE

SUPPLEMENTAL REPORT AND RECOMMENDATION

Plaintiff, an inmate in the custody of the Michigan Department of Corrections, filed this suit under 42 U.S.C. 1983 alleging that defendants violated his constitutional rights. Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). On January 21, 1998, I entered a report recommending that defendants' motion to dismiss be granted as plaintiff's damages claims and that the Department of Corrections be dismissed as a defendant. As to plaintiff's claim of denial of access to the courts for declaratory or injunctive relief, I ordered plaintiff to file a supplemental response demonstrating any actual prejudice suffered by plaintiff. On February 9, 1998, plaintiff filed a response to my January 21, 1998, Order. This report and recommendation addresses plaintiff's claim of a violation of his constitutional right of access to the courts for declaratory and injunctive relief.

1. BACKGROUND[1]

Plaintiff Melvin Scott Willman is a prisoner, housed at the Robert Cotton Correctional Facility located in Jackson, Michigan. Plaintiff's brother, an attorney, is representing him in a habeas corpus action which was to be filed by October 28, 1997. Plaintiff's brother is also representing him in the present action. A temporary restraining order was issued by Judge Friedman, in Judge Rosen's absence, ordering the individual defendants to permit plaintiff's attorney to visit plaintiff during non-family visitation hours. The temporary restraining order expired on October 28, 1997.

Plaintiff alleges that defendants have violated his First Amendment right of access to the courts to petition for redress of his grievance by restricting his attorney-brother's visits to family visitation hours only. According to plaintiff, he was denied visitation with his attorney during non-family visitation hours because his attorney is a family member, pursuant to Michigan Prison Rule 607, Mich. Admin. Code r. 791.6607, which prohibits visitation with a prisoner by his attorney during non-family visitation hours if the attorney is related to the prisoner.[2] Plaintiff's remaining claims against defendants are

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[1] The facts surrounding plaintiff's complaint are more fully described in my earlier Report and Recommendation dated January 21, 1998.

[2] Rule 607 provides in part that:

> (2) Except when the person is related to the prisoner by blood or marriage, a prisoner shall be allowed to visit with any of the following persons, who shall not be required to be on the prisoner's approved visitor list:
>
> * * *

for declaratory and injunctive relief.

In their Motion to Dismiss, defendants proffered prison security justifications for the specific restriction placed on family member attorneys. Defendants also challenged plaintiff's First Amendment claim, arguing that plaintiff failed to plead any facts showing actual prejudice suffered by plaintiff in the pending *habeas* action due to the restriction.

In plaintiff's response to the January 21, 1998, Order, plaintiff claims that he has suffered monetary damages in having to seek a temporary restraining order and to file the present action in order that he have access to his counsel for his habeas action.[3]

II. STANDARD OF REVIEW

A. Dismissal pursuant to Fed. R. Civ. P. 12(b)(6)

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept all well-pleaded allegations as

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(c) Attorneys on official business or a legal para-professional or law clerk who is acting as an aide to counsel for the prisoner.

(Michigan Prison Rule 607, Mich. Admin. Code r. 791.6607)

[3] Plaintiff also claims that he suffered prejudice when he was transferred to a different cell allegedly because of retaliatory motives, when he was allegedly denied proper medical treatment for his tooth and his shoulder, and when defendants allegedly interfered with his legal mail. These claims do not deal with any prejudice suffered by plaintiff for purposes of the present action relating to the restriction on access to his attorney. Therefore, those new claims are not addressed in this report and recommendation.

P. 12(b)(6), a court must accept all well-pleaded allegations as true and construe them in the light most favorable to plaintiff. *Zinermon v. Burch*, 494 U.S. 113, 117 (1990); 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE 1357, at 304 (2d ed. 1990). *See also Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976). A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). It is also well established, however, that conclusory, unsupported allegations of constitutional deprivation do not state a claim.[4]

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[4] *See, e.g., Ana Leon T. v. Federal Reserve Bank*, 823 F.2d 928, 930 (6th Cir.) ("The allegations must be more than mere conclusions, or they will not be sufficient to state a civil rights claim."), *cert. denied*, 484 U.S. 945 (1987); *Chapman v. City of Detroit*, 808 F. 2d 459, 465 (6th Cir. 1986) ("it is not enough for a complaint ... to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis for such claims must be set forth in the pleadings."); *Smith v. Rose*, 760 F.2d 102, 106 (6th Cir. 1985) (conclusory, unsupported allegations insufficient to state a claim); *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983) (dismissal of complaint appropriate if allegations of constitutional deprivation are "mere conclusions"); *Ross v. Meagan*, 638 F.2d 646, 650 (3rd Cir. 1981) ("[T]his court has consistently demanded that a civil rights complaint contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs."); *Place*

B. Plaintiff has failed to allege any actual prejudice in support of his claim of the violation of his First Amendment right

Plaintiff has alleged that the restrictive regulation, as stated above, impedes his attorney's effective handling of his habeas claims. Plaintiff alleges that as a result of being denied multiple visits with his attorney, he suffered monetary damages incurred in the filing the present action. Although Michigan Prison Rule 607 restricts plaintiff's visitation with his attorney, plaintiff has not shown that he has suffered any actual prejudice relating to the *habeas* action.

Prisoners have a First Amendment right of access to the courts. *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491 (1977). The First Amendment right of access to the courts includes the right to reasonable access to their counsel.

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violation so of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the

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will not be sufficient to state a cause of action under the Civil Rights Act if its allegations are but conclusions."); *Borenstein v. City of Philadelphia*, 595 F. Supp. 853, 856 (E.D. Pa. 1984) ("[C]ivil rights complaints must be pleaded with specificity and may not merely make conclusory allegations of constitutional deprivations or the existence of municipal policies."); *Egan v. Concini* 585 F. Supp. 801,803 (M.D. Pa. 1984) (Factual specificity required in order to enable court to evaluate substance of claim).

> a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.

Procunier v. Martinez, 416 U.S. 396, 419, 94 S. Ct. 1800 (1974)(citation omitted).

The Sixth Circuit, citing *Twyman v. Crisp*, 584 F.2d 352, 357 (10th Cir. 1978), has suggested that a claim of denial of access to the court must be supported by evidence of actual prejudice, such as missing court deadlines for submission of motions or responsive pleadings. *Walker v. Mintzes*, 771 F.2d 920, 932 (6th Cir. 1985. The inmate must have suffered an actual interference with his case. *Weaver v. Toombs*, 756 F. Supp. 335, 340 (W.D. Mich. 1989).

Plaintiff has failed to demonstrate any actual prejudice suffered with respect to his habeas action as a result of being denied access to his attorney during non-family visitation hours. Thus, plaintiff's claim for declaratory and injunctive relief should be denied.

III. RECOMMENDATION

For the reasons stated above, it is recommended that defendants' motion to dismiss be granted as to plaintiff's claims against defendants for declaratory and injunctive relief.

Any objections to this Report and Recommendation must be filed within ten (10) days of its service. 28 U.S.C. 636(b)(1); E.D. Mich. LR 72.1(d)(2). Failure to file objections within the specified time constitutes waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140(1985); *Ivey v. Wilson*, 832 F.2d 950, 957-58 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate

Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

s/s Steven D. Pepe
Steven D. Pepe
United States Magistrate Judge

Dated: Feb 24 1998
Ann Arbor, Michigan

Pursuant to Rule 77(d), FRCivP copies have been mailed to the following:

Linda Olvieri
Daniel Willman
on 1/21/99

/s/
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,
PLAINTIFF,

CASE NO. 97-CV-73866-DT

VS.

MICHIGAN DEPARTMENT OF CORRECTIONS, KENNETH MCGINNIS, DENNIS STRAUB, RALPH MORGAN, SUED IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES,
DEFENDANTS.

HONORABLE GERALD E. ROSEN
HONORABLE STEVEN D. PEPE

Eastern Dist.
of Michigan
Filed 1/21/98

ORDER REGARDING STAY OF PROCEEDINGS

On January 12, 1998, plaintiff filed a Motion for Stay of the Proceedings in Order to Petition the United States Supreme Court for an Extraordinary Writ. For reasons stated below, plaintiff's motion for stay of the proceedings is DENIED.

In his complaint, plaintiff alleges that defendants have violated his constitutional rights by restricting his attorney-brother's visits to family visitation hours only. Plaintiff's brother, an attorney, is representing him in a *habeas corpus* action which was to be filed by October 28, 1997.[1] Plaintiff claims that he was denied visitation with his attorney during non-

[1] Daniel C. Willman, plaintiff's brother, is also representing plaintiff in the present action.

family visitation hours because his attorney is a family member. The restriction was imposed pursuant to Michigan Prison Rule 607, Mich. Admin. Code r. 791.6607, which prohibits visitation with a prisoner by his attorney during non-family visitation hours if the attorney is related to the prisoner. The defendants have filed motions to dismiss plaintiff's claim under Fed. R. Civ. P. 12(b)(6). In a Report and Recommendation issued this same date, I have recommended that plaintiff's claims for monetary damages for violation of his First Amendment rights be dismissed. Plaintiff also sought declaratory relief and a permanent injunction.

In his complaint, plaintiff has made only general allegations that the restriction on access to his attorney-brother in a federal *habeas* petition has impeded the effectiveness of that habeas representation in denying plaintiff effective access to the courts. In order to allow the plaintiff an additional opportunity to demonstrate the nature and extent of any actual prejudice caused by the application of Michigan Prison Rule 607 to limit plaintiff's access to his attorney, I have granted plaintiff until February 10, 1998, to supplement the record. Once these submissions are obtained, the undersigned will reach a determination as to any declaratory and/or injuctive relief to which plaintiff may be entitled. Until this is accomplished, and the District Judge has had an opportunity to consider both of the Reports and Recommendations, there is no judgment nor any meaningful order that would appear to fall within the scope of the United States Supreme Court Rule 23 on stays. A stay of the proceedings would unnecessarily delay resolution of this case. It also appears that plaintiff's petition for an extraordinary writ is without merit.

Accordingly, IT IS ORDERED that plaintiff's motion for a stay of the proceedings is DENIED.

s/s Steven D. Pepe
Steven D. Pepe
United States Magistrate Judge

Dated: Jan 21 1998
Ann Arbor, Michigan

Pursuant to Rule 77(d), FRCivP copies have been mailed to the following:

Linda Olvieri
Daniel Willman
on 1/21/99

/s/
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,
PLAINTIFF,

CASE NO. 97-CV-73866-DT

VS.

MICHIGAN DEPARTMENT OF CORRECTIONS; ET AL.
DEFENDANTS.

HONORABLE GERALD E. ROSEN

JUDGMENT
At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan

On Mar 25 1998

Present: Honorable Gerald E. Rosen
United States District Judge

The Court having this date entered an Order adopting the Magistrate Judge's two Reports and Recommendations of January 21 and February 24, 1998 and granting Defendants' Motion to Dismiss,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Complaint, be, and hereby is, DISMISSED in its entirety with prejudice.

Eastern Dist.
of Michigan
Filed 3/25/98

/s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,
PLAINTIFF,

CASE NO. 97-CV-73866-DT

VS.

MICHIGAN DEPARTMENT OF CORRECTIONS; ET AL.
DEFENDANTS.

HONORABLE GERALD E. ROSEN

ORDER ADOPTING MAGISTRATE JUDGE'S TWO REPORTS AND RECOMMENDATIONS AND DISMISSING PLAINTIFF'S COMPLAINT

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan

On Mar 25 1998

Present: Honorable Gerald E. Rosen
United States District Judge

This matter having come before the Court on Magistrate Judge Steven D. Pepe's January 21, 1998 Report and Recommendation of his February 24, 1998 Supplemental Report and Recommendation recommending that the Court grant Defendants' Motion to Dismiss, and dismiss Plaintiff's Complaint in its entirety; and Plaintiff having timely filed objections to the Magistrate Judge's Reports and Recommendations; and the Court having reviewed both of the R&Rs, Plaintiff's Objections, and the Court's entire file of this action and having concluded that, for the reasons stated by the Magistrate Judge, this case should

be dismissed in its entirety; and the Court being otherwise fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation of January 21, 1998 and Supplemental Report and Recommendation of February 24, 1998 be, and hereby are, adopted by this court.

IT IS FURTHER ORDERED that, for the reasons set forth in the Magistrate Judge's Reports and Recommendations, Defendants' Motion to Dismiss be, and hereby is, GRANTED. Plaintiff's Complaint, therefore, is DISMISSED in its entirety with prejudice.

s/s Steven D. Pepe
Steven D. Pepe
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MERVIN SCOTT WILLMAN,
PLAINTIFF,

CASE NO. 97-CV-73866-DT

VS.

MICHIGAN DEPARTMENT OF CORRECTIONS, DENNIS MCGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS, DENNIS STRAUB, ACTING WARDEN OF THE ROBERT COTTON CORRECTIONAL FACILITY LOCATED IN JACKSON, MICHIGAN, AND RALPH MORGAN, ASSISTANT TO THE WARDEN OF THE JOHN COTTON CORRECTIONAL FACILITY LOCATED IN JACKSON, MICHIGAN, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY, JOINTLY AND SEVERALLY,
DEFENDANTS.

HONORABLE GERALD E. ROSEN

Eastern Dist.
of Michigan
Filed 8/7/97

ORDER GRANTING TEMPORARY RESTRAINING ORDER

This matter having come before the court on a Motion for Temporary Restraining Order and Preliminary Injunction, and the court having heard the matter as presiding judge in the absence of Judge Gerald E. Rosen, accordingly,

IT IS HEREBY ORDERED that the above-named individual defendants shall permit attorney Daniel C. Willman attorney visitation with his client, Mervin Scott Willman, as they

would with any other non-related attorney action on official attorney-client business.

IT IS FURTHER ORDERED that this order shall expire on October 28, 1997, the deadline for filing inmate Willman's Petition for Writ of Habeas Corpus.

/s/ Bernard A. Friedman
Bernard A. Friedman
United States District Judge

Dated: August 7, 1997
Detroit, Michigan

R. 791.6607 Visitation; visiting hours; quotas; religious; legal, and official visits.

Rule 607. (1) The department shall establish reasonable visiting hours and uniform quotas at each institution for visits to prisoners to promote order and security in the institutions and to prevent interference with institutional routine or disruption of the prisoner's visiting quota. A visit described in sub rule(2) of this rule shall not be counted toward a prisoner's visiting quota.

(2) Except when the person is related by blood or marriage, a prisoner shall be allowed to visit with any of the following persons; who shall not be required to be on the prisoner's approved visitor list;

(a) Qualified members of the clergy of the prisoner's designated religion or clergy that the prisoner specifically request to see.

(b) Volunteers in an outreach program that is sponsored by an external religious organization if the volunteers meet the requirements issued by the director for approved volunteers.

(c) Attorneys on official business or a legal paraprofessional or law clerk who is acting as an aide to counsel for the prisoner.

(d) An official representative of the legislative, judicial, or executive branch of government.

(Eff. Nov. 30, 1977; amended Eff. Oct. 29, 1993; amended Eff. Aug. 25, 1995.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

ARTICLE III. section 2. Holds in part:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties.

ARTICLE VI. section 2 (The Supremacy clause):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

1st AMENDMENT I [1791]:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

11th AMENDMENT XI [1798]:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

CONSTITUTIONAL AND STATUTORY PROVISIONS - continued

14th AMENDMENT XIV [1868]

> Section. 1. All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"AMERICANS WITH DISABILITIES ACT OF 1990"

Sec. 201. DEFINITION. 42 U.S.C. § 12115:

> As used in this title:
> (1) Public entity.-- The term "public entity"means-
> (A) any State or local government;
> (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government."

Sec. 202. DISCRIMINATION. 42 U.S.C. § 12132:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

"AMERICANS WITH DISABILITIES ACT OF 1990" - Continued

SEC. 505. ATTORNEY'S FEES. 42 U.S.C. § 12205;

> In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable fore the foregoing the same as a private individual.